

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----	X
SULLIVAN & CROMWELL LLP,	:
	:
Petitioner,	:
	:
v.	:
	:
JAMES C. JUSTICE II (individually and as	:
Trustee of the James C. Justice GRAT No. 1	:
and of the James C. Justice GRAT No. 2),	:
JAMES C. JUSTICE III, JILLEAN L.	:
JUSTICE, and JAMES C. JUSTICE	:
COMPANIES, INC.,	:
	:
Respondents.	:
-----	X

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MEMORANDUM IN SUPPORT OF PETITION TO CONFIRM AWARD

David B. Tulchin
William H. Wagener
Megan Bradley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

*Attorneys for Petitioner Sullivan
& Cromwell LLP*

May 23, 2016

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Pursuant to CPLR § 7510, Petitioner Sullivan & Cromwell LLP (“Sullivan & Cromwell”) respectfully submits this Memorandum in support of its Petition to Confirm Arbitration Award. The Award in question was entered on May 12, 2016 in favor of Sullivan & Cromwell and against James C. Justice II, James C. Justice III, Jillean L. Justice, and James C. Justice Companies, Inc. (collectively, “Respondents”), in *Sullivan & Cromwell LLP v. James C. Justice II et al.*, an American Arbitration Association (“AAA”) proceeding conducted in New York County (AAA Case No. 01-15-002-9299). A copy of the Award duly rendered in that proceeding is annexed to the accompanying Petition to Confirm Arbitration Award as Exhibit A.

INTRODUCTION

The Petition seeks to confirm an arbitration Award, issued by a panel of three duly appointed arbitrators following a five-day Hearing in New York County, in accordance with a valid agreement to arbitrate.¹ Sullivan & Cromwell commenced the arbitration proceeding in 2015 to resolve a dispute regarding legal fees owed to it by James C. Justice II (“Jim Justice”), his two adult children (James C. Justice III and Jillean Justice), and one of Jim Justice’s companies (James C. Justice Companies, Inc.). On May 12, 2016, the arbitration panel awarded Sullivan & Cromwell \$3,255,898.46, plus interest accruing at 9% from that date. Respondents are jointly and severally liable to satisfy the Award. The Award should promptly be confirmed.

A. The Underlying Delaware Litigation

The fee dispute that was the subject of the arbitration pertains to Sullivan & Cromwell’s representation of Respondents (Jim Justice, his two adult children and James C. Justice Companies, Inc.) in a lawsuit that was commenced in early 2014 in the Court of Chancery of the State of Delaware (“the Delaware litigation”). (Petition, ¶ 9 & Ex. A, ¶ 7.) In

¹ A copy of the February 18, 2014 Engagement Letter setting forth the parties’ agreement to arbitrate is annexed to the Petition as Exhibit B.

the Delaware litigation, Sullivan & Cromwell represented Respondents pursuant to a written Engagement Letter (Ex. B to the accompanying Petition). The Engagement Letter provided that Respondents were obligated to pay \$1 million up front, and also to pay Sullivan & Cromwell a contingent fee equal to 15% of the “value” of any “Recovery” obtained in 2015 by Respondents in the Delaware litigation (minus the \$1 million previously paid). (Ex. B to Petition, ¶¶ 1, 5-6.)

In the Delaware litigation, Respondents sought to recover money damages from Mechel Bluestone Inc. (a Delaware company) and Mechel Mining OAO (a Russian company) pursuant to a 2009 contract. (Petition, ¶ 9 & Ex. A, ¶ 8.) In early 2015, the Delaware litigation was settled in a deal that provided, among other things, for Respondents to re-acquire certain coal properties that they had sold to these Mechel entities years earlier. (Petition, ¶ 11 & Ex. A, ¶ 19.) Although the Engagement Letter obligated Respondents to pay Sullivan & Cromwell 15% of the “value” of those coal properties (minus \$1 million), Respondents refused to pay anything. (Petition, ¶ 11.)

As a result, Sullivan & Cromwell commenced the arbitration that is the subject of this Petition to Confirm. The Engagement Letter provided that any dispute regarding the legal fee owing to Sullivan & Cromwell would be “resolved expeditiously via binding arbitration in New York City before 3 arbitrators, all of whom shall be members of the New York bar, under the rules of the American Arbitration Association.” (Ex. B to Petition, ¶ 6.)

B. The Arbitration Award

In conformity with the requirements of the Engagement Letter, Sullivan & Cromwell commenced an arbitration proceeding by filing, in March 2015, a Statement of Claim with the AAA in New York City. (Petition, ¶ 13 & Ex. A, ¶ 24.) Respondents filed an answering statement with the AAA on April 8, 2015. (Petition, ¶ 14 & Ex. A, ¶ 25.) The AAA

appointed a Panel of three arbitrators on June 9, 2015. (Petition, ¶ 15 & Ex. A, ¶ 28.) Respondents have never made any objection to the composition of the Panel—each of whom is a member of the New York Bar—and agreed unambiguously that any dispute about the legal fees they owed to Sullivan & Cromwell should be resolved by the AAA arbitration. (Petition, ¶¶ 14, 16.)

In early 2016, the arbitration Panel conducted a five-day Hearing in New York County pursuant to the AAA’s Commercial Arbitration Rules. (Petition, ¶ 17 & Ex. A, ¶¶ 32-34.) The Panel heard testimony from five fact witnesses and three experts, and the Hearing transcript is nearly 1,500 pages. (Petition, ¶ 17.) The Panel also received hundreds of exhibits and requested (and received) lengthy post-Hearing submissions from the parties. (Petition, ¶ 17.)

On May 12, 2016, the Panel entered its Award, which provides that: (i) Sullivan & Cromwell is entitled to legal fees in the amount of \$2,594,776.77; (ii) Sullivan & Cromwell is entitled to pre-award interest in the amount of \$253,918.30; (iii) Respondents shall pay Sullivan & Cromwell’s costs of prosecuting the arbitration, in the amount of \$320,204.12; and (iv) Respondents shall reimburse Sullivan & Cromwell \$86,999.27 for the portion of the administrative fees of the AAA and compensation of the Panel it incurred. (Petition, ¶¶ 19-20 & Ex. A, pp. 33-34.) The total is \$3,255,898.46. The Panel also ruled that Sullivan & Cromwell is entitled to interest at a rate of 9% per year from the date of the Award, up to and including the date on which the amount due on the Award is paid in full. (Ex. A to Petition, p. 34.) Respondents are jointly and severally liable for these amounts.

Under CPLR § 7510, courts “shall confirm” arbitral awards within one year of their delivery to the parties, unless the award is vacated or modified. No grounds to vacate or

modify the Award exist here, and the Award should be confirmed and judgment should be entered as a matter of settled New York law.

STANDARD OF REVIEW

Arbitration is “well recognized as an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process.” *Maross Constr., Inc. v. Cent. N.Y. Regional Transp. Auth.*, 66 N.Y.2d 341, 345, 488 N.E.2d 67, 69, 497 N.Y.S.2d 321, 323 (1985). Accordingly, the CPLR mandates that a court “shall confirm an [arbitration] award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in [CPLR] section 7511.” CPLR § 7510. Judgment “shall be entered upon the confirmation of an award.” CPLR § 7514(a). A party seeking to vacate an arbitration award bears the burden of proof. *E.g., Curley v. State Farm Ins. Co.*, 269 A.D.2d 240, 242, 702 N.Y.S.2d 305, 307 (1st Dep’t 2000).

New York courts cannot “pass upon the merits of the dispute” when hearing a petition to confirm, vacate or modify an arbitration award. CPLR § 7501. When reviewing an award resolving a contract dispute, “[c]ourts are bound by an arbitrator’s factual findings, interpretation of the contract and judgment concerning remedies.” *N.Y. State Correctional Officers & Police Benevolent Ass’n v. State of New York*, 94 N.Y.2d 321, 326, 726 N.E.2d 462, 465, 704 N.Y.S.2d 910, 913 (1999); *see also, e.g., Sims v. Siegelson*, 246 A.D.2d 374, 376-77, 668 N.Y.S.2d 20, 22 (1st Dep’t 1998) (“[A]ny inquiry into [the] factual and legal determinations of the arbitrators is prohibited.”).

New York courts will not disturb an arbitration award even if the arbitrator made factual or legal errors. *Madison Realty Capital, L.P. v. Scarborough-St. James Corp.*, 135 A.D.3d 652, 652, 25 N.Y.S.3d 83, 84 (1st Dep’t 2016) (“[E]ven in circumstances where an

arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice.” (quoting *N.Y. State Correctional Officers & Police Benevolent Ass’n*, 94 N.Y.2d at 326, 726 N.E.2d at 465-66, 704 N.Y.S.2d at 913-14)). Indeed, in a contract dispute, “an arbitrator’s interpretation of the parties’ contract is impervious to judicial challenge even where the apparent, or even the plain, meaning of the words of the contract has been disregarded.” *Maross Constr.*, 66 N.Y.2d at 346, 488 N.E.2d at 70, 497 N.Y.S.2d at 324 (internal quotation marks omitted). See also *Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 373, 777 N.Y.S.2d 82, 88 (1st Dep’t 2004) (declining to disturb arbitrators’ interpretation of contract term).

Arbitrators have extraordinarily broad discretion in determining what remedies to award, and New York courts are bound by such determinations. It is black letter law (from our Court of Appeals) that an arbitrator’s “paramount responsibility is to reach an equitable result.” *SLG 625 Lessee, LLC v. Neiman Marcus Group, Inc.*, 112 A.D.3d 541, 542, 978 N.Y.S.2d 130, 131 (1st Dep’t 2013) (quoting *Sprinzen v. Nomberg*, 46 N.Y.2d 623, 629, 389 N.E.2d 456, 458, 415 N.Y.S.2d 974, 977 (1979)). “Arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result.” *Benedict P. Morelli & Assocs., P.C. v. Shainwald*, 49 A.D.3d 476, 476-77, 854 N.Y.S.2d 133, 134 (1st Dep’t 2008); see also, e.g., *N. Syracuse Cent. School Dist. v. N. Syracuse Educ. Ass’n*, 45 N.Y.2d 195, 200, 379 N.E.2d 1193, 1195, 408 N.Y.S.2d 64, 67 (1978) (arbitrators may “disregard technicalities to achieve a just result”). Accordingly, an arbitrator’s damages award will not be disturbed by a court, even if it was not “arrived at by precise mathematical computations” or would be “so speculative as to be unsupportable if awarded by a court.” *Bd. of Educ. v. Niagara-Wheatfield Teachers Ass’n*, 46 N.Y.2d 553, 557, 389 N.E.2d 104, 106, 415 N.Y.S.2d 790, 792 (1979); see also, e.g., *N.Y. State*

Correctional Officers & Police Benevolent Ass'n, 94 N.Y.2d at 326, 726 N.E.2d at 465, 704 N.Y.S.2d at 913 (courts are “bound” by arbitrator’s “judgment concerning remedies”).

“Consistent with the public policy favoring arbitration, the grounds for vacating an arbitration award are narrowly circumscribed by statute.” *Brown & Williamson Tobacco Corp.*, 7 A.D.3d at 372, 777 N.Y.S.2d at 87. Under CPLR § 7511(b)(1), where (as here) all parties participated in the arbitration, awards may be vacated only upon a showing: (1) of “corruption, fraud or misconduct in procuring the award,” (2) of “partiality of an arbitrator appointed as a neutral,” (3) that the arbitrator “exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made,” or (4) of a “failure to follow the procedure of [CPLR Article 75], unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.” Otherwise, only a totally irrational determination, or a determination that clearly violates a strong public policy, may be set aside. *See, e.g., N.Y. State Correctional Officers & Police Benevolent Ass'n*, 94 N.Y.2d at 326, 726 N.E.2d at 466, 704 N.Y.S.2d at 914; *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308, 461 N.E.2d 1261, 1266, 473 N.Y.S.2d 774, 779 (1984); *Madison Realty Capital*, 135 A.D.3d at 653, 25 N.Y.S.3d at 84.

It is crystal clear that there are no grounds to vacate or modify the Award.

ARGUMENT

I. THIS COURT SHOULD CONFIRM THE AWARD.

CPLR § 7510 mandates that New York courts “shall confirm an [arbitral] award upon application of a party made within one year of its delivery to him, unless the award is vacated or modified upon a ground specified in [CPLR] section 7511.” The Award was delivered to Sullivan & Cromwell and to Respondents on May 12, 2016. Accordingly, Sullivan & Cromwell is entitled to entry of a judgment pursuant to CPLR § 7514(a), and to receive 9%

interest on the Award, running from the date of the Award.² CPLR §§ 5002-5004; *see, e.g., Niagara-Wheatfield Teachers Ass’n*, 46 N.Y.2d at 558, 389 N.E.2d at 107, 415 N.Y.S.2d at 793 (“[U]pon confirmation of an arbitrator’s award, interest should be provided from the date of the award.”); *Dermigny v. Harper*, 127 A.D.3d 685, 686, 6 N.Y.S.3d 561, 562 (2d Dep’t 2015) (party “was entitled to prejudgment interest accruing from the date of the arbitration award, and to postjudgment interest pursuant to CPLR 5003”).

II. THERE IS NO BASIS TO VACATE OR MODIFY THE AWARD.

“It is beyond cavil that the scope of judicial review of an arbitration proceeding is extremely limited.” *Brown & Williamson Tobacco Corp.*, 7 A.D.3d at 371, 777 N.Y.S.2d at 86. Thus, the Award may be vacated only if it “violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator’s power” under CPLR § 7511. *N.Y. State Correctional Officers & Police Benevolent Ass’n*, 94 N.Y.2d at 326, 726 N.E.2d at 466, 704 N.Y.S.2d at 914. None of these narrow exceptions applies to the Award.

The Arbitrators who comprised the arbitral tribunal were three experienced members of the New York Bar. (Petition, ¶ 15.) The Arbitrators were selected by the AAA based on “strike and rank” lists submitted by the parties, and all arbitrators provided the parties with disclosure statements. (*Id.*, ¶¶ 15-16.) No party has ever objected to this Panel or contended that any arbitrator engaged in misconduct or was not impartial (*id.*, ¶ 16), and Respondents have waived any objections to the Panel. *See, e.g., Siegel v. Lewis*, 40 N.Y.2d 687, 689-90, 358 N.E.2d 484, 485-86, 389 N.Y.S.2d 800, 801-02 (1976) (explaining that “the method for selecting arbitrators and the composition of the arbitral tribunal have been left to the contract of the parties” and that “assent by a party to the choice of an arbitrator in the face of that party’s

² A proposed Judgment is annexed to the Petition as Exhibit C.

knowledge of a relationship between the other side and the arbitrator is a waiver of his right to object” (internal quotation marks omitted)).

Further, the Engagement Letter authorized the Panel to resolve any dispute regarding the legal fees owed to Sullivan & Cromwell in connection with its representation of the four Respondents in the Delaware litigation. (Ex. B to Petition, ¶ 6.) Because the Engagement Letter contains no “specifically enumerated limitation on the [Panel’s] power,” the Award plainly did not exceed the Panel’s authority. *Town of Callicoon v. Civ. Serv. Emps. Ass’n, Inc.*, 70 N.Y.2d 907, 909, 519 N.E.2d 300, 300, 524 N.Y.S.2d 389, 389 (1987) (reversing vacatur of award, where “a broad arbitration clause in the parties’ collective bargaining agreement . . . empowered the arbitrator to resolve disputes concerning the interpretation and application of the agreement, subject only to the limitation that the arbitrator could not add to or subtract from the agreement”). Nor could there be any contention that the Panel failed to follow the procedure of Article 75. Thus, none of the narrow grounds for vacating an award under CPLR § 7511 is even arguably applicable.

The Award should be confirmed.

CONCLUSION

The Court should enter an order confirming the Award and a judgment thereon pursuant to CPLR §§ 7510 and 7514(a), including 9% interest from the date of the Award pursuant to CPLR §§ 5002-5004.

DATED: May 23, 2016
New York, New York

By: /s/ David B. Tulchin
David B. Tulchin
William H. Wagener
Megan Bradley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

*Attorneys for Petitioner Sullivan &
Cromwell LLP*